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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1963

No. 446

INDEPENDENT IRON WORKS, INC., a corporation,

Petitioner,

vs.

UNITED STATES STEEL CORPORATION, BETHLEHEM PACIFIC COAST STEEL CORP., BETHLEHEM STEEL CO., KAISER STEEL CORP.,

Respondents.

BRIEF OF RESPONDENTS BETHLEHEM PACIFIC COAST STEEL CORPORATION AND BETHLEHEM STEEL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the court of appeals (R. 4158-4191) is reported in ..... F.2d ..... The opinion of the district court (R. 780-796) is reported in 177 F.Supp. 743.

QUESTIONS PRESENTED

The questions stated by petitioner (Pet., pp. 2-5) are inaccurate and argumentative statements based upon erroneous representations of the record.

The true questions presented as to Bethlehem[1] are:

1. Did the district court and the court of appeals correctly hold that petitioner's evidence failed to show any facts which would support a conclusion or inference of Sherman Act violation?

2. Where petitioner charged limitation of structural steel sold to it during a specified period when demand outran supply, did the district court in its discretion properly, as the court of appeals held, admit evidence of representative transactions outside the period and exclude other cumulative evidence?

PRELIMINARY STATEMENT

Petitioner brought this suit under the Sherman Act for treble damages.[2] At the close of petitioner's evidence on liability, the district court granted respondents' mo-

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[1]Respondents Bethlehem Pacific Coast Steel Corporation and Bethlehem Steel Company were wholly owned subsidiaries of Bethlehem Steel Corporation (not a defendant). Unless the context otherwise requires, the affiliated companies will be referred to as "Bethlehem."

[2]The Sherman Act claims against all respondents are set forth in counts 1 and 2 of petitioner's complaint. The third count thereof, based upon section 10 of the Clayton Act, is directed against United States Steel Corporation alone. The matters covered by petitioner under the caption "Southern Pacific Car Undertrame Bids" and the first section of argument in its petition for certiorari (Pet., pp. 6-11, 17-22) concern United States Steel Corporation and do not relate in any way to Bethlehem.

tions for directed verdict and entered judgment of dismissal on the merits (R. 796, 840). The court of appeals affirmed, with an opinion which reveals meticulous review of the record.

The rulings of the courts below turn upon the particular facts and evidence in this case and are clearly correct. They are not in conflict with any other decision, and are entirely consistent with the decisions of this Court cited by petitioner (Pet. pp. 16-17).

No legal principle is at issue; the petition involves only application of established rules of law to the circumstances of this individual case. The petition does not involve any novel question or any question of general importance. The case is the common one of failure of proof.

STATEMENT OF THE CASE

This case arises out of the nationwide steel shortage that existed in the latter part of 1955. Petitioner complains that Bethlehem and the other respondents did not furnish petitioner all the steel it wanted during the shortage.

Petitioner was a structural steel fabricator with a plant located in Oakland, California. Structural fabricating was and is highly competitive, with numerous fabricators in the San Francisco Bay Area alone (R. 2401-2404).

The principal steel products used by structural fabricators are structural shapes and plates. Structural shapes

wide flange beams (H-shaped products best known for their use in multistory buildings).

Respondents are steel producers, and are also engaged in structural fabricating. Bethlehem has been in the structural fabricating business for more than 40 years, and has competed on the West Coast for about 30 years (R. 2401). Bethlehem uses steel it produces in its own fabricating operations, but it sells the major share of its structural steel production to trade customers, including fabricators such as plaintiff (R. 4023). It needs the good will of trade fabricators for its own business success.

Demand for structural steel has fluctuated widely in the years since World War II, depending largely on the activity of the construction industry. Structural demand outran the productive ability of the mills during several periods, despite continuous growth in mill capacity (R. 2529-2533).

Steel mill operations were at only 71 per cent of capacity in 1954 (R. 4012). But in 1955 the structural fabricating industry booked over 4,650,000 tons of new work, a record tonnage (R. 4010-4011). After months of not having enough orders, Bethlehem was deluged with orders for structural steel beginning in the second quarter of 1955. By the fourth quarter, the industry was operating at over 98 per cent of capacity, while Bethlehem's own mills exceeded 100 per cent of rated capacity (R. 4012-4014).

Faced with a record demand, Bethlehem (like other steel producers) could not immediately accept all orders tendered. Each producer had to adopt some method to

distribute its structural steel production equitably among its customers but, as petitioner's own purchasing agent conceded, the various mills used different methods of allocating or rationing steel (R. 1419).

Petitioner tried to beat the shortage by placing large duplicate orders with Bethlehem and other suppliers (R. 1545). Bethlehem accepted orders for tonnages of structural steel at a rate exceeding that of petitioner's purchases from Bethlehem in past years. Not satisfied with its total supplies, however, petitioner filed this suit on November 28, 1955, claiming damages for the period from January 1, 1955 to the date of complaint. The court denied petitioner's motion for a preliminary injunction to compel respondents to furnish all the steel petitioner wanted (R. 288, 3876).

After a month-long trial, petitioner rested its case upon a record that included the testimony of 41 witnesses, 122 exhibits offered by petitioner and 71 exhibits offered by respondents on cross-examination (R. 3526-3528, 3943-3946). Respondents moved to dismiss and for directed verdicts.

The trial court issued a written opinion reviewing the evidence and granting the motions (Pet. Appx. B). The court of appeals has exhaustively reviewed the record and affirmed the dismissal of the action.

ARGUMENT

I. NO RULE OF LAW IS IN ISSUE; THE UNDISPUTED FACTS PRESENT NO JURY QUESTION: THE PETITION INVOLVES ONLY ESTABLISHED LEGAL PRINCIPLES AND THE EVIDENCE IN THIS PARTICULAR CASE.

The petition seeks no more than a third review of the application of settled principles to undisputed facts. Lack of foundation for any reasonable inference of antitrust violation is apparent from evidence which was without conflict.[3]

Rulings of the courts below are correct and in accord with other decisions. The petition does not raise any question that is new or important, and indeed does not put any legal principle at issue.

There is only the common failure of a plaintiff's proof to sustain its charges in a particular case.

II. THE COURTS BELOW CORRECTLY VIEWED THE EVIDENCE AS A WHOLE AND IN THE LIGHT MOST FAVORABLE TO PETITIONER.

In an effort to raise a legal issue, petitioner asserts (Pet., pp. 2-3, 16-17) that the courts below failed to apply established principles of inference recently reviewed by this Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.* (1962) 370 U.S. 690. This assertion is spurious. It is perfectly clear that the courts below viewed the evidence as a whole and in the light most favorable to petitioner.

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[3]The trial court noted in its opinion (R. 784):

"* * * the court's way has been made easier by the remarkable absence of any real conflicts in the evidence. Despite the size of the record, the basic facts are not in dispute."

The district court stated (Pet. Apps. B, p. vi):

> "On these motions plaintiff is entitled to and must receive the benefit of all favorable inferences which can be drawn from the evidence."

And further (pp. xv-xvi):

> "In reviewing separately the evidence relating to each of plaintiff's contentions, *the court has not overlooked giving consideration to them in their entirety.* The record as a whole has been reviewed and whether plaintiff's charges are taken singly or collectively, the conclusion is inescapable that no logical or reasonable inference of conspiracy between the defendants could be drawn" (emphasis ours).

The court of appeals stated (Opn., p. 5):

> "After a painstaking review of the voluminous record, consisting of over 4,000 pages of testimony and several hundred exhibits, we are fully satisfied and firmly convinced that plaintiff's entire case comes within the rule approved by the Supreme Court, that 'it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding' [citing authority].
>
> Parenthetically we deem it appropriate at this point to observe that, although we have set out and discussed seriatim the various business practices which plaintiff contends the defendants commonly followed, *nevertheless we have, in fact, considered them collectively* and our conclusion reflects a faithful adherence to the recent admonition of the Supreme Court that 'in cases such as this, plaintiffs should be given the full benefit of their proof without fragile compartmental-

izing the various factual components and wiping the slate clean after scrutiny of each.' Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962)" (emphasis ours).

III. THE DECISION BELOW CORRECTLY AFFIRMED DISMISSAL OF THE ACTION: THE UNDISPUTED FACTS VIEWED IN THE LIGHT OF APPLICABLE LEGAL PRINCIPLES NEGATE ANY REASONABLE INFERENCE OF ANTITRUST VIOLATION.

A. Alleged conspiracy among respondents.

Petitioner argues six factors on which its claim of conspiracy is based (Pet., pp. 11-16). Without exception, its charges vanish before the facts proved. The evidence, considered item by item or as a whole, shows only ordinary, competitive business action and intent, and provides no basis for any conspiratorial inference.

Undisputed facts positively *disprove* the alleged denial or delay of steel supply by Bethlehem. Petitioner's own proof shows Bethlehem accepted and filled petitioner's orders on the jobs in issue, and made steel available on a basis which went beyond petitioner's past purchases from Bethlehem. The few references to Bethlehem in the petition reflect the complete failure of the evidence as a whole to support any inference of wrongful conduct.

1. Steel allocation in the 1955 shortage period.

The petition is notably silent on the undisputed record demand for structural steel which developed about the middle of 1955 (R. 3055-3060, 4010-4013). It was the admitted shortage conditions which impelled the distribution practices of respondents.

The producers, including Bethlehem, each adopted some method of dividing steel among its customers. Far from evidence of conspiracy, this was the normal, businesslike reaction to the pressures of excessive demand.[4]

Beyond that generality, there was little similarity of detail between the methods of Bethlehem and other respondents. Reviewing and contrasting their several methods, the court of appeals concluded (Op., pp. 6-7):

> "Clearly each defendant was fully justified, if not actually impelled, to take some affirmative steps in its own behalf to preserve so far as possible the continued good will of customers. Moreover, there was very little similarity of detail in the way each defendant divided production. * * * These methods do not evidence similarity; their variety strongly suggests individual action."

2. Vertical integration.

Though conceding that "vertical integration per se might not be illegal", petitioner argues it is somehow suspect (Pet., p. 12). Vertical integration is commonplace throughout American business and is indisputably legal (*U.S. v. Columbia Steel Co.* (1948) 334 U.S. 495, 525). Bethlehem has engaged in fabrication as well as production of steel for some 40 years (R. 2401).

3. Treatment of trade customers and own fabricating shops.

The cornerstone of petitioner's case was the charge that respondents had conspiratorially withheld steel from

[4] As the trial court stated in its opinion (Pet. Appx. B, p. 61): "The antitrust laws were not meant to prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or a similar policy."

petitioner. Proof of Bethlehem's actual handling of petitioner's orders totally destroyed the case against Bethlehem. Bethlehem's trial counsel reviewed with petitioner's purchasing agent on cross-examination every purchase order of petitioner for steel from Bethlehem on the stipulated jobs (on which petitioner specifically relied for proof of its charges), every delivery promise of Bethlehem in response to such orders, and all the shipping notices which accounted for delivery of every pound of ordered steel for the jobs up through the date of the complaint (R. 2025-2130).

The undisputed facts—the detailed testimony elicited from petitioner's own purchasing agent—were that Bethlehem accepted *every* such order for steel tendered by petitioner for use on the jobs in issue, and that it filled *every* such order on time except for minor delays on a small amount of tonnage (R. 2025-2130).

The impact of such testimony is reflected in the fact that the petition nowhere claims that Bethlehem refused specific orders for steel or delayed shipments on particular jobs. Recognizing its failure to prove its claim, petitioner seeks refuge in a general comparison of amounts of steel Bethlehem shipped to petitioner in 1954 and 1955 (Pet., p. 14). Petitioner's fallacious comparison fails to reveal the undisputed fact that the reduction in total Bethlehem shipments to petitioner in 1955 was due, first, to lack of orders by petitioner in the first half of the year when steel was freely available (R. 1367, 1964-1965, 1980-1984); and, second, to the fact that Bethlehem could not fill all orders in the latter part of 1955 at precisely the times petitioner requested because of the record demand.

complicated by production interferences due to mill expansion programs, strikes and other delaying factors beyond Bethlehem's control (R. 2131, 3055-3064, 4010-4013).

Further, despite demand and production conditions, Bethlehem made 400 tons a month of eastern structural shapes available to petitioner at the height of the 1955 shortage, though in no prior year had petitioner purchased as much as 4,800 tons of such shapes (R. 2106-2109, 4018-4019). This increased rate of supply disposed of petitioner's claim of "arbitrary historical allocations" limited by past purchases.

Petitioner next charges that, while steel was rationed to other fabricators, the fabricating shops of respondents got unlimited amounts of steel (Pet., pp. 13-14). No evidence supported this charge; the proof was to the contrary. The evidence was uncontroverted that each respondent limited the amount of steel it supplied to its shops on the same general basis as steel it sold to other customers (R. 1579-1582, 2507, 2716, 3239, 3292-3294, 3308, 3316). The court of appeals concisely stated (Op., p. 9):

> "* * * we need not consider that question [the right of a supplier to favor its own subsidiary] because no favoritism is apparent from the record. Defendants' plants were placed under restrictions equivalent to those imposed on the plaintiff."

Not only did Bethlehem's shops receive steel on the same basis as all other customers (R. 3239, 3316), its shops received less tonnage of wide flange shapes in 1955 than in any year since 1947 save one (R. 3168, 4023). The trend in shipments as between Bethlehem's own shops and trade customers has been strongly in favor of trade customers

(R. 3167-3169; 4023). In a fragment of argument, petitioner claims that Bethlehem shipped more structural shapes to its West Coast fabricating shops than to trade fabricators in the third quarter of 1955 (Pet., p. 13). The court below laid bare the misrepresentation of the record behind this assertion in footnote 12 of its opinion (Op., p. 11). This footnote is but an example of the painstaking examination of even minor facets of the record pursued by the court of appeals in affirming the dismissal.

f. Alleged price uniformity.

The petition refers to alleged "price uniformity" (Pet., p. 14), for no apparent reason except that everyone knows "price fixing" is an antitrust charge. Petitioner does not claim any damage from prices charged, uniform or not; it has never contended any Bethlehem price was unfair. This is a supply case, not a price case.

Moreover, the proof showed not price uniformity but price variation. The court of appeals tabulates the variations of a dollar a ton and more in footnote 13 (Op., pp. 12-13). Petitioner's purchasing agent testified that a difference of a dollar a ton on a standardized product like

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[5]Petitioner also asserts that Bethlehem made prompt delivery of steel to its own shops, but not to petitioner; and complains that Bethlehem had the "effrontery" to advertise that it fabricated and erected steel work "on time" (Pet., p. 14). As above noted, Bethlehem's performance on petitioner's orders was in fact remarkably good. It was undisputed that Bethlehem's own shops experienced delays as did other fabricators (R. 3253-3263, 3272-3274). To advertise one's reliability is as old as advertising itself. And advertisement of work "on time" no more than corroborated Bethlehem's practice of trying to quote delivery dates it could meet, in contrast to petitioner's admitted practice of bidding without regard for anticipated steel supply (R. 2419-2420).

steel was sufficient to determine petitioner's choice of supplier, and that "there is more of a variance in price than that" (R. 1999). This was why petitioner sought to buy certain products (such as wide flange shapes) from Bethlehem, and other products from other suppliers.[6]

5. Sales of steel between respondents.

Petitioner argues that respondents "traded off" steel (Pet., pp. 14-15). Bethlehem on occasion both sold to and purchased various products from United States Steel Corporation and Kaiser Steel Corporation and other suppliers. From the undisputed evidence it was apparent, as the court of appeals stated (Op., pp. 13-15):

> "By characterizing the sales and purchases of steel between defendants as 'trades' the plaintiff attempts to impart a conspiratorial significance to what were in fact—so far as this record shows—no more than ordinary business transactions. * * * What is apparent is that, if a defendant did not make a particular product or if because of a difference in freight charges, due to the location of the mill where the product was made, it was cheaper to buy from another producer, then the two dealt with each other, but on the same terms that were extended to all buyers."

The volume of such sales was minimal (R. 1622-1626, 2545, 3249, 3999-4004). Petitioner itself had "exchange accounts" with other local fabricators, and its purchasing agent admitted it was "common practice" for fabricators to make occasional sales to one another (R. 1920-1921).

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[6] In the same vein, petitioner concedes that Bethlehem was the principal supplier of wide flange beams on the West Coast, not for any conspiratorial reason, but because its mills are so located that "a favorable ocean freight rate is applicable" (Pet., p. 25).

6. **Alleged noncompetition of respondents in certain areas.**

Petitioner's last contention is plainly insubstantial. The argument is that an inference of conspiracy arises from the admitted facts that Bethlehem and Kaiser Steel Corporation do not have warehouses but United States Steel Corporation has, and that Bethlehem builds ships while United States Steel Corporation does not (Pet., p. 15). At the same time, petitioner argues that an inference of conspiracy also arises from the opposite fact that respondents all have competing fabricating shops (Pet., p. 12). These arguments destroy each other.

In sum, petitioner's alleged "factors from which the jury might have drawn an inference of conspiracy" were never more than accusations. The actual evidence showed normal business conduct, as the courts below found. By no stretch of reason did the undisputed facts permit any inference of conspiracy.

The proof of Bethlehem's performance in supplying steel to petitioner established that Bethlehem did *not* refuse to accept orders or delay deliveries as petitioner charged (R. 2025-2130). The facts swept away the charge.

B. Alleged individual attempt to monopolize.

Petitioner insists it relies upon alleged individual attempt to monopolize as well as alleged conspiracy to monopolize (Pet., p. 24). But conspiracy presupposes that respondents agreed to act jointly for their mutual benefit, while individual attempt to monopolize presupposes that each respondent sought market position in derogation of the other respondents. The failure of proof on the individ-

ual attempt charge was as absolute as on the inconsistent conspiracy charge.

Petitioner argues attempt to monopolize structural steel and structural fabricating, but there was no evidence to show the total market for structural steel or structural fabricating in the western states, or the market share of any respondent. The only evidence on the subject establishes that Bethlehem's share in structural fabricating has substantially *declined* over the years (R. 4023, 4077-4078).

In a more refined flight of fancy, petitioner argues that Bethlehem attempted to monopolize "the fabrication of multistory buildings" (Pet., p. 25). But the proof did not show even that Bethlehem fared better in securing such work than other fabricators. Actually, the "multistory building" jobs which were the principal subject of evidence at trial—the Tulare County Courthouse and the Union Oil Center—were successfully obtained by *petitioner* in competitive bidding against Bethlehem and other fabricators (R. 1716, 1810, 2692-2693).

Further, nothing in the record indicates that "multistory buildings" comprise a separate market differentiated from many other similar types of structural fabricating. The court of appeals correctly pointed out (Op., p. 16):

> "We are left to speculate whether there was a distinct economic market for this product, and, if so, the extent of that market."

C. Alleged conspiracy between the affiliated Bethlehem companies.

In another peripheral contention, petitioner argues a theory of intra-enterprise conspiracy between Bethlehem Steel Company and Bethlehem Pacific Coast Steel Corporation (Pet., pp. 35-37). Bethlehem Pacific Coast Steel Corporation, created for internal corporate reasons to handle the Bethlehem business on the Pacific Coast, existed from 1945 to 1959. During this period, Bethlehem Steel Company operated in the rest of the country (R. 3046-3048).

Here again, when it came to proof, petitioner had nothing to offer beyond the mere fact of separate corporate existence for a given period—a wholly legal and commonplace business practice susceptible of no invidious inference. The court of appeals dealt shortly with the point (Op., p. 11):

> "There is a measure of similarity evidenced in the policies these defendants adopted with respect to distribution of structural steel, and there is the additional fact that they were subsidiaries of a larger corporation and hence under common ownership; that is the most that can be said of the evidence tending to support plaintiff's claim. This falls short of the proof required to make out a prima facie case of conspiracy."

The propriety of such conduct of corporate operations is manifest in antitrust statutes and decisions. Section 7 of the Clayton Act, while condemning certain mergers and acquisitions, expressly provides for the ordinary conduct

of business operations through subsidiary corporations.[7] The rule of the cases is that the fact of corporate relationship will not insulate from liability a business enterprise otherwise violating the law (*United States v. Yellow Cab Co.* (1947) 332 U.S. 218; *United States v. Columbia Steel Co.* (1948) 334 U.S. 495, 522-523). No authority holds that business operations lawful when conducted through a single corporate entity become unlawful if conducted by affiliated corporate units of the same enterprise.[8]

IV. EXCLUSIONS OF EVIDENCE BY THE TRIAL COURT WERE PROPER; AND EVEN IF ADMITTED, SUCH EVIDENCE WOULD NOT HAVE CHANGED THE RESULT.

Petitioner presented testimony from 41 witnesses during a month of trial. The court admitted 193 exhibits (R. 3943-3946). The trial transcript comprised over 2,800 pages.

The chief issue is necessarily the failure of the mass of evidence admitted to support any reasonable inference of

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[7] "Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations."

[8] Petitioner's reliance (Pet., p. 37) on *Kiefer-Stewart Co. v. Seagram & Sons* (1951) 340 U.S. 211, *Schine Theatres v. United States* (1948) 334 U.S. 110, and *Sanib Corporation v. United Fruit Company* (S.D.N.Y. 1955) 135 F.Supp. 764, is misplaced. *Schine* and *Sanib* were monopolization cases where liability would have existed even had the business enterprise been a single corporation. In *Kiefer-Stewart*, instead of an organizational division of functions between the affiliated corporations, this Court pointed out that they "hold themselves out as competitors" (340 U.S. 215). No comparable circumstances exist here.

wrongdoing. Petitioner's further contention that some items of evidence were improperly excluded merits but brief notice.

Section 2111 of Title 28 of the United States Code establishes the principle that cases are not to be reversed where no substantial effect on the petitioner is demonstrated. Petitioner's threshold problem—and it is an insurmountable problem—is that the *admitted* evidence proved that petitioner had no case. Petitioner would need, in short, not only to locate additional evidence, but to eliminate proof it heretofore put in the record which contradicts its claims against Bethlehem.

Important apart from the wide-ranging evidence the court allowed is that the limitations on scope of proof were basically determined by the prior release executed by petitioner and by the date it elected to file suit; and were further determined by petitioner's cumulative job-by-job approach to the case and its voluntary concessions that limitations were necessary (R. 591, 860-861, 995, 1204-1209, 1220-1222, 1279).[9] Petitioner had previously brought other antitrust suits against United States Steel Corporation and Bethlehem, and had given a complete release as to all acts through December 31, 1954 (R. 182, 772-773). Pre-1955 evidence could thus only be for "atmosphere" or "background", and could not be the basis for any damage claim. With reference to evidence of

[9] The Judicial Conference of the United States in its authoritative Report on Procedure in Anti-Trust and Other Protracted Cases (1951) has stated (p. 25):

"Such evidence as is merely possibly helpful, or which merely supplies 'atmosphere' or 'background', may be rigidly excluded. * * * The matter is within the discretion of the trial judge."

acts after the date of the complaint herein, petitioner advised the trial court it intended to bring a separate suit, and stressed its desire that this action not involve, so as to be res judicata of, petitioner's damage claims for any subsequent period (R. 683-684).[19]

Five items of excluded evidence are mentioned by petitioner. The deposition of Dr. Kreps, an economist (Pet., pp. 27-31), and the two documents of the Civilian Production Administration dated in 1946 (Pet., pp. 38-41), are fully and correctly disposed of by the court of appeals (Op., pp. 21-24, 28). The remaining three items, referred to by petitioner as "Judson-Pacific Murphy Corp. Testimony", "Union Steel Company Testimony" and "Department of Employment Building Testimony" (Pet., pp. 41-43), were similarly urged by petitioner in the court below (Appellant's Opening Brief, pp. 116-121). The court of appeals viewed these items as "ones [not] having sufficient merit to warrant discussion" (Op., p. 28).

Such rulings were clearly justified and, to repeat, all of the excluded evidence could not have aided petitioner where the admitted evidence demonstrated that petitioner had no case.

[19]Petitioner's motion on the eve of trial for leave to file a supplemental complaint (Pet., p. 45) was, as the court of appeals held (Op., pp. 27-28), properly denied.

CONCLUSION

The decision of the court of appeals is clearly correct. It rests upon an appraisal of the facts and evidence in this record concurred in by both courts below. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
October 6, 1963.

Respectfully submitted,

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